

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FILED  
SEP 13 2018  
CLERK, U.S. DISTRICT COURT  
By \_\_\_\_\_ Deputy

Defendants.

101  
 102  
 103  
 104  
 105  
 106  
 107  
 108  
 109  
 110  
 111  
 112  
 113  
 114  
 115  
 116  
 117  
 118  
 119  
 120  
 121  
 122  
 123  
 124  
 125  
 126  
 127  
 128  
 129  
 130  
 131  
 132  
 133  
 134  
 135  
 136  
 137  
 138  
 139  
 140  
 141  
 142  
 143  
 144  
 145  
 146  
 147  
 148  
 149  
 150  
 151  
 152  
 153  
 154  
 155  
 156  
 157  
 158  
 159  
 160  
 161  
 162  
 163  
 164  
 165  
 166  
 167  
 168  
 169  
 170  
 171  
 172  
 173  
 174  
 175  
 176  
 177  
 178  
 179  
 180  
 181  
 182  
 183  
 184  
 185  
 186  
 187  
 188  
 189  
 190  
 191  
 192  
 193  
 194  
 195  
 196  
 197  
 198  
 199  
 200  
 201  
 202  
 203  
 204  
 205  
 206  
 207  
 208  
 209  
 210  
 211  
 212  
 213  
 214  
 215  
 216  
 217  
 218  
 219  
 220  
 221  
 222  
 223  
 224  
 225  
 226  
 227  
 228  
 229  
 230  
 231  
 232  
 233  
 234  
 235  
 236  
 237  
 238  
 239  
 240  
 241  
 242  
 243  
 244  
 245  
 246  
 247  
 248  
 249  
 250  
 251  
 252  
 253  
 254  
 255  
 256  
 257  
 258  
 259  
 260  
 261  
 262  
 263  
 264  
 265  
 266  
 267  
 268  
 269  
 270  
 271  
 272  
 273  
 274  
 275  
 276  
 277  
 278  
 279  
 280  
 281  
 282  
 283  
 284  
 285  
 286  
 287  
 288  
 289  
 290  
 291  
 292  
 293  
 294  
 295  
 296  
 297  
 298  
 299  
 300  
 301  
 302  
 303  
 304  
 305  
 306  
 307  
 308  
 309  
 310  
 311  
 312  
 313  
 314  
 315  
 316  
 317  
 318  
 319  
 320  
 321  
 322  
 323  
 324  
 325  
 326  
 327  
 328  
 329  
 330  
 331  
 332  
 333  
 334  
 335  
 336  
 337  
 338  
 339  
 340  
 341  
 342  
 343  
 344  
 345  
 346  
 347  
 348  
 349  
 350  
 351  
 352  
 353  
 354  
 355  
 356  
 357  
 358  
 359  
 360  
 361  
 362  
 363  
 364  
 365  
 366  
 367  
 368  
 369  
 370  
 371  
 372  
 373  
 374  
 375  
 376  
 377  
 378  
 379  
 380  
 381  
 382  
 383  
 384  
 385  
 386  
 387  
 388  
 389  
 390  
 391  
 392  
 393  
 394  
 395  
 396  
 397  
 398  
 399  
 400  
 401  
 402  
 403  
 404  
 405  
 406  
 407  
 408  
 409  
 410  
 411  
 412  
 413  
 414  
 415  
 416  
 417  
 418  
 419  
 420  
 421  
 422  
 423  
 424  
 425  
 426  
 427  
 428  
 429  
 430  
 431  
 432  
 433  
 434  
 435  
 436  
 437  
 438  
 439  
 440  
 441  
 442  
 443  
 444  
 445  
 446  
 447  
 448  
 449  
 450  
 451  
 452  
 453  
 454  
 455  
 456  
 457  
 458  
 459  
 460  
 461  
 462  
 463  
 464  
 465  
 466  
 467  
 468  
 469  
 470  
 471  
 472  
 473  
 474  
 475  
 476  
 477  
 478  
 479  
 480  
 481  
 482  
 483  
 484  
 485  
 486  
 487  
 488  
 489  
 490  
 491  
 492  
 493  
 494  
 495  
 496  
 497  
 498  
 499  
 500  
 501  
 502  
 503  
 504  
 505  
 506  
 507  
 508  
 509  
 510  
 511  
 512  
 513  
 514  
 515  
 516  
 517  
 518  
 519  
 520  
 521  
 522  
 523  
 524  
 525  
 526  
 527  
 528  
 529  
 530  
 531  
 532  
 533  
 534  
 535  
 536  
 537  
 538  
 539  
 540  
 541  
 542  
 543  
 544  
 545  
 546  
 547  
 548  
 549  
 550  
 551  
 552  
 553  
 554  
 555  
 556  
 557  
 558  
 559  
 560  
 561  
 562  
 563  
 564  
 565  
 566  
 567  
 568  
 569  
 570  
 571  
 572  
 573  
 574  
 575  
 576  
 577  
 578  
 579  
 580  
 581  
 582  
 583  
 584  
 585  
 586  
 587  
 588  
 589  
 590  
 591  
 592  
 593  
 594  
 595  
 596  
 597  
 598  
 599  
 600  
 601  
 602  
 603  
 604  
 605  
 606  
 607  
 608  
 609  
 610  
 611  
 612

NO. 4:18-CV-576-A

Plaintiffs filed their original petition in the District Court of Tarrant County, Texas, 236th Judicial District, on April

25, 2017, naming Ford and RLB as defendants. Doc.<sup>1</sup> 9, tab 2. On July 27, 2017, Ford was served, id. at tab 7, and, on August 18, 2017, filed its answer and special exceptions. Id. at tab 11. On August 21, 2017, plaintiffs filed their first amended petition omitting their claims against Ford, naming RLB as the sole defendant. Id. at tab 12. On June 25, 2018, plaintiffs filed their second amended petition, this time asserting claims against Ford and RLB. Id. at tab 25. On June 27, 2018, Ford was served, id. at tab 27, and on July 13, 2018, filed its notice of removal, bringing the action before this court. Doc. 2. Ford says that RLB was fraudulently or improperly joined to defeat diversity jurisdiction and that its citizenship should be disregarded. Doc. 9 at 5-10.

Plaintiffs are the wife, minor children, and parents of Joshua Harbuck ("Harbuck"), who was killed in a rollover accident on January 17, 2017, in Erath County, Texas. Doc. 9 at tab 25. Plaintiffs say that this is a "negligence, strict products liability and breach of warranty case." Id. at 2 ¶ 7. They allege that the vehicle Harbuck was driving, a 2008 Ford F-250, had a rollover protection system ("ROPS") that was defectively designed, manufactured, assembled, marketed and sold by Ford. Id. at 3 ¶¶ 20-24. They allege that RLB was negligent in providing

---

<sup>1</sup>The "Doc. \_\_" reference is to the number of the item on the docket in this action.

incorrect factual representations regarding the vehicle and expressly and impliedly warranted that the vehicle was fit for its intended purposes. Id. at 6-8.

## II.

### Motion to Remand

Plaintiffs contend that Ford has failed to show that RLB was improperly or fraudulently joined and that the action must be remanded to the state court from which it was removed.

## III.

### Applicable Legal Principles

#### A. Removal

Under 28 U.S.C. § 1441(a), a defendant may remove to federal court any state court action of which the federal district court would have original jurisdiction.<sup>2</sup> "The removing party bears the burden of showing that federal subject matter jurisdiction exists and that removal was proper." Manguno v. Prudential Prop. & Cas. Ins. Co., 276 F.3d 720, 723 (5th Cir. 2002) (citations omitted). "Moreover, because the effect of removal is to deprive the state court of an action properly before it, removal raises significant federalism concerns . . . which mandate strict construction of

---

<sup>2</sup> The removal statute provides, in pertinent part, that: [A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. 28 U.S.C. § 1441(a) (emphasis added).

the removal statute." Carpenter v. Wichita Falls Indep. Sch. Dist., 44 F.3d 362, 365-66 (5th Cir. 1995). Any doubts about whether removal jurisdiction is proper must therefore be resolved against the exercise of federal jurisdiction. Acuna v. Brown & Root Inc., 200 F.3d 335, 339 (5th Cir. 2000).

B. Fraudulent or Improper Joinder

To determine whether a party was fraudulently or improperly joined to prevent removal, "the court must analyze whether (1) there is actual fraud in pleading jurisdictional facts or (2) the plaintiff is unable to establish a cause of action against the nondiverse defendant." Campbell v. Stone Ins., Inc., 509 F.3d 665, 669 (5th Cir. 2007). Because Ford has not alleged actual fraud in the pleadings, the applicable test for improper joinder is:

whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant.

Smallwood v. Ill. Cent. R.R., 385 F.3d 568, 573 (5th Cir. 2004).

To answer this question, the court may either: (1) conduct a Rule 12(b)(6)-type analysis or (2) in rare cases, make a summary inquiry "to identify the presence of discrete and undisputed facts that would preclude plaintiff's recovery against the in-state defendant." Id. at 573-74.

C. The Pleading Standard to be Used in the Rule 12(b)(6)-  
Type Analysis

Although there has been some uncertainty as to the pleading standard to be applied, the Fifth Circuit has most recently held that federal courts should use the federal court pleading standard when conducting the Rule 12(b)(6)-type analysis of an improper joinder claim in a motion to remand to determine if the plaintiff has stated a claim against a nondiverse defendant. Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd., 818 F.3d 193, 208 (5th Cir. 2016).<sup>3</sup> Rule 8(a)(2) of the Federal Rules of Civil Procedure provides, in a general way, the applicable standard of pleading. It requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), "in order to give the defendant fair notice of what the claim is and the grounds upon which it rests," Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotation marks and ellipsis omitted). Although a complaint need not contain detailed factual allegations, the "showing" contemplated by Rule 8 requires the plaintiff to do more than simply allege legal conclusions or

---

<sup>3</sup>The court notes that Texas now has a failure-to-state-a-claim rule that is substantially the same as the federal rule and that Texas courts have interpreted their Rule 91a as requiring a Federal Rule 12(b)(6)-type analysis and have relied on federal case law in applying Rule 91a. See, e.g., Wooley v. Schaffer, 447 S.W.3d 71, 76 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2014, pet. denied); GoDaddy.com, LLC v. Toups, 429 S.W.3d 752, 754-55 (Tex. App.—Beaumont 2014, pet. denied). Thus, the outcome would be the same if the court were to apply the Texas pleading standard.

recite the elements of a cause of action. Twombly, 550 U.S. at 555 & n.3. Thus, while a court must accept all of the factual allegations in the complaint as true, it need not credit bare legal conclusions that are unsupported by any factual underpinnings. See Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.").

Moreover, to survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), the facts pleaded must allow the court to infer that the plaintiff's right to relief is plausible. Iqbal, 556 U.S. at 678. To allege a plausible right to relief, the facts pleaded must suggest liability; allegations that are merely consistent with unlawful conduct are insufficient. Id. In other words, where the facts pleaded do no more than permit the court to infer the possibility of misconduct, the complaint has not shown that the pleader is entitled to relief. Id. at 679. "Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id.

Rule 9(b) sets forth the heightened pleading standard imposed for fraud claims: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting

fraud or mistake." The Fifth Circuit requires a party asserting fraud to "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." Hermann Holdings, Ltd. v. Lucent Techs., Inc., 302 F.3d 552, 564-65 (5<sup>th</sup> Cir. 2002) (internal quotations and citations omitted). Succinctly stated, Rule 9(b) requires a party to identify in its pleading "the who, what, when, where, and how" of the events constituting the purported fraud. Dorsey v. Portfolio Equities, Inc., 540 F.3d 333, 339 (5<sup>th</sup> Cir. 2008). Rule 9(b) applies to all cases where the gravamen of the claim is fraud even though the theory supporting the claim is not technically termed fraud. Frith v. Guardian Life Ins. Co. of Am., 9 F. Supp. 2d 734, 742 (S.D. Tex. 1998). Claims alleging violations of the Texas Insurance Code and the Texas DTPA as well as those for fraud, fraudulent inducement, fraudulent concealment, and negligent misrepresentation are subject to the requirements of Rule 9(b). Berry v. Indianapolis Life Ins. Co., 608 F. Supp. 2d 785, 800 (N.D. Tex. 2009); Frith, 9 F. Supp. 2d at 742.

#### IV.

##### Analysis

In this case, Ford is the manufacturer and RLB the seller of a vehicle with an allegedly defective component system, the ROPS.

Under Texas law:

(a) A seller that did not manufacture a product is not liable for harm caused to the claimant by that product unless the claimant proves:

. . . .

(5) that:

(A) the seller made an express factual representation about an aspect of the product;

(B) the representation was incorrect;

(C) the claimant relied on the representation in obtaining or using the product; and

(D) if the aspect of the product had been as represented, the claimant would not have been harmed by the product or would not have suffered the same degree of harm; [or]

(6) that:

(A) the seller actually knew of a defect to the product at the time the seller supplied the product; and

(B) the claimant's harm resulted from the defect[.]

Tex. Civ. Prac. & Rem. Code § 82.003 (West 2017). Plaintiffs allege that they have pleaded facts to establish each of these exceptions as to RLB. Doc. 12 at 8.

Plaintiffs acknowledge that § 82.003(a)(5) involves the making of a misrepresentation. Doc. 12 at 9. Hence, Rule 9(b) of the Federal Rules of Civil Procedure is applicable. However,



plaintiffs have not pleaded any facts to identify the "who, what, when, where, and how" of the alleged misrepresentation by RLB. Instead, they merely recite the statutory language, which would not in any event be sufficient. See Ashcroft, 556 U.S. at 679. Further, although they argue that the term "crashworthy" is an established term of art, they fail to recognize that the statute requires a statement about a particular aspect of the product and not its reliability in general. Doc. 12 at 9-10. See Howard v. Lowe's Home Centers, LLC, 306 F. Supp. 3d 951, 958 (W.D. Tex. 2018); Gill v. Michelin N. Am., Inc., 3 F. Supp. 3d 579, 585 (W.D. Tex. 2013); Benavides v. Chrysler Group, LLC, No. 7:14-CV-518, 2014 WL 5507716, \*4 (S.D. Tex. Oct. 9, 2014).

As for the "actual knowledge" exception, plaintiffs argue that they pleaded two relevant allegations:

[t]here was a complete failure by Defendant RLB to provide any warnings regarding the F-250's lack of crashworthiness in a rollover crash, which risk was known or by the application of reasonably developed human skill and foresight should have been known to RLB.

Doc. 9, tab 25 ¶ 40. And,

The conduct of Defendant was done knowingly. Id. ¶ 53 (emphasis added). Doc. 12 at 11-12. Again, the allegations are wholly conclusory. The "actual knowledge" exception requires just that. The equivocation that RLB knew of

the risk or "by the application of reasonably developed human skill and foresight should have [] known" of the risk is fails to meet the test. Benavides, 2014 WL 5507716, at \*4.

Finally, in any event, the court may make a summary inquiry to determine whether any discrete and undisputed facts exist that would preclude plaintiffs' recovery against the in-state defendant. Smallwood, 385 F.3d at 573-74. Here plaintiffs have pleaded that they relied on false representations made by RLB and that they would not have purchased the vehicle absent these false representations, Doc. 9, tab 25 ¶ 38. However, the record establishes that RLB only dealt with Harbuck (not any of the plaintiffs); RLB made no representations to Harbuck regarding the vehicle's safety or crashworthiness; and, RLB expressly disclaimed all warranties. Doc. 16 at 20-73, 77, 81. It would have been easy enough for plaintiffs to raise a fact issue, e.g., that RLB made misrepresentations to one of them, but they made no attempt to do so. Instead, they insinuate that there must be a legitimate claim against RLB because the state judge denied its motion for summary judgment. Doc. 12 at 13. That a state court judge declined to grant a motion for summary judgment is not evidence of anything except, perhaps, that state courts rarely, if ever, grant summary judgment motions. As plaintiffs themselves argued, RLB failed to meet its summary judgment burden. Doc. 16

at 90, 95. The state court did not have to determine whether there was a genuine fact issue for trial.

For the foregoing reasons, the court concludes that plaintiffs named RLB as a defendant in this action for the purpose of attempting to defeat federal court jurisdiction. RLB was improperly joined. None of the claims asserted against it would survive a motion to dismiss for failure to state a claim upon which relief may be granted, with the consequence that its citizenship should be disregarded in determining whether diversity jurisdiction exists. And, the court has concluded, for the same reason, that the claims against RLB should be dismissed.

V.

Order

The court ORDERS that plaintiffs' motion to remand be, and is hereby, denied.

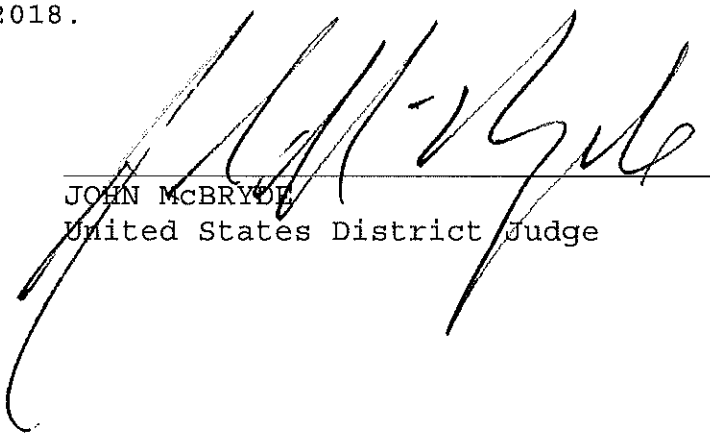
The court further ORDERS that plaintiff's claims against RLB be, and are hereby, dismissed without prejudice.

The court determines that there is no just reason for delay in, and hereby directs, entry of final judgment as to the dismissal of plaintiffs' claims against RLB.

The court further ORDERS that the caption of this action be

amended to reflect that Ford is the sole defendant.

SIGNED September 13, 2018.



JOHN MCBRYDE  
United States District Judge